

Shi Ling v City of New York

2014 NY Slip Op 32585(U)

September 29, 2014

Supreme Court, New York County

Docket Number: 155030/2014

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

Signed
order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
SHI LING,

Plaintiff,

-against-

DECISION/ORDER
Index No. 155030/2014
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed, J.S.C.

THE CITY OF NEW YORK,

Defendant.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1,2.(Exs. A-D)
ANSWERING AFFIDAVIT.....	3.....
REPLYING AFFIDAVIT.....	4.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff Shi Ling moves, pursuant to General Municipal Law (“GML”) § 50-c (5), for an order deeming the notice of claim which she filed on defendant The City of New York (“the City”) on March 20, 2014, sounding in false arrest, false imprisonment, and excessive force, to be deemed filed timely *nunc pro tunc*. In the alternative, plaintiff seeks leave to file a late notice of claim on the City sounding in malicious prosecution. The City opposes the application. Upon oral argument, a review of the papers presented, and the relevant statutes and case law, this Court **grants** the

application to the extent of deeming the notice of claim filed against respondents on March 20, 2014 timely filed *nunc pro tunc* provided that plaintiff provide the City with authorizations allowing the City to examine, inspect, and copy the file and record in the criminal proceeding against plaintiff, and to unseal the police records in connection therewith.

Factual and Procedural Background:

Plaintiff Shi Ling claims that, on October 14, 2013, New York City Police Officer Yeoman Castro falsely arrested and falsely imprisoned her. She also claims that Officer Castro used excessive force. The accusatory instrument written by Officer Castro on November 5, 2013 reflects that, on the day of plaintiff's arrest, the latter was selling counterfeit handbags at 727 Eighth Avenue in Manhattan. Ex. A.¹ On January 21, 2014, plaintiff accepted an adjournment in contemplation of dismissal. Plaintiff's Aff. In Support, at par. 7.

On March 20, 2014, plaintiff filed a notice of claim against the City alleging false arrest, false imprisonment, and excessive force arising from the October 14, 2013 incident. Ex. B.

On May 21, 2014, plaintiff commenced an action against the City alleging the same causes of action. Ex. C. Plaintiff claimed that she remained "in custody and confinement" from October 14 until October 15, 2013. Ex. C. The City joined issue by service of its answer on June 13, 2014. Ex. D.

Plaintiff now moves, pursuant to GML § 50-c (5), to deem her notice of claim to have been timely served. The City opposes the motion, which was filed on June 24, 2014.

¹Unless otherwise noted, all references are to the exhibits annexed to plaintiff's motion.

Positions of the Parties:

In an affirmation in support of plaintiff's motion, plaintiff's counsel asserts that this Court should deem plaintiff's notice of claim to have been filed in a timely fashion. Counsel asserts that plaintiff did not file a notice of claim within 90 days because she did not wish to "seek to obtain any civil remedies until she was no longer in criminal jeopardy with a constitutional right to remain silent, and the criminal action against her had been adjourned in contemplation of dismissal." Plaintiff's Aff. In Support, at par. 8. Further, counsel maintains that the City was not prejudiced by plaintiff's delay in filing the notice of claim because it "made a multitude of records in the ordinary course of business of the Police Department, the Office of the District Attorney and the Criminal Court, and can readily make an investigation at this time and obtain any relevant records, as well as the names of witnesses, especially its own participating employees." Plaintiff's Aff. In Support, at par. 11.

The City argues that plaintiff's motion must be denied since her excuse for failing to file a timely notice of claim, i.e., that criminal charges were pending against her, is deficient. Next, the City asserts that plaintiff failed to demonstrate that it had actual knowledge of the facts giving rise to the claim within 90 days after the said claim arose. In support of this argument, the City maintains that it is prevented from investigating the claim because plaintiff's criminal records "were most likely sealed". City's Aff. In Opp., at par. 18. Further, the City asserts that plaintiff failed to demonstrate that it would not be prejudiced if plaintiff were permitted to serve a late notice of claim.

In a reply affirmation in further support of plaintiff's motion, plaintiff's counsel reiterates his arguments that plaintiff set forth a reasonable excuse for her delay in filing a notice of claim and that the City will not be prejudiced if plaintiff is granted leave to file a late notice of claim.

Conclusions of Law:

It is well settled that, in order to commence a tort action against a municipality, the claimant is required to serve a notice of claim within 90 days of the alleged injury. *See* GML § 50-e (1)(a); *Funt v Human Resources Admin. of the City of New York*, 68 AD3d 490 (1st Dept 2009), *lv dismissed* 15 NY3d 911 (2010); *Jordan v City of New York*, 41 AD3d 658, 659 (2d Dept. 2007). The filing of a notice of claim is a condition precedent without which an action against a municipal entity is barred.

Despite the foregoing, GML § 50-e (5) confers upon a court the discretion to determine whether to permit the filing of a late notice of claim. In making this determination, the court must consider the factors set forth in the said statute, which include: (1) an explanation for the delay in filing a timely notice of claim; (2) whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days or a reasonable time thereafter; and (3) whether the late filing has substantially prejudiced the entity's ability to investigate and defend against the claim. *See* GML §50-e (5); *Williams v Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535 (2006), *Plaza v New York Health & Hosps. Corp.*, 97 A.D.3d 466 (1st Dept. 2012); *Bazile v City of New York*, 94 A.D.3d 929, 929-930 (2d Dept. 2012); *Acosta v City of New York*, 39 A.D.3d 629 (2d Dept. 2007); *Seif v City of New York*, 218 A.D.2d 595 (1st Dept. 1995); *Goldstein v Clarkstown Cent. School Dist.*, 208 A.D.2d 537 (2d Dept. 1994), *lv denied* 85 N.Y.2d 810 (1995). While the court has discretion in determining these motions, the statute is remedial in nature and, as such, should be liberally construed. *See Camacho v City of New York*, 187 A.D.2d 262 (1st Dept. 1992).

“[W]hether the public corporation acquired timely knowledge of the essential facts constituting the claim is seen as a ‘factor which should be afforded great weight.’” *Matter of*

Dell'Italia v Long Is. R.R. Corp., 31 A.D.3d 758, 759 (2d Dept. 2006), quoting *Matter of Morris v County of Suffolk*, 88 A.D.2d 956 (2d Dept. 1982), *affd* 58 N.Y.2d 767 (1982). Indeed, actual knowledge of the essential facts of the claim, not just knowledge of the occurrence, must have been acquired by the City. See *Matter of Santopietro v. City of New York*, 50 A.D.3d 390 (1st Dept. 2008); *Chattergoon v. New York City Hous. Auth.*, 197 A.D.2d 397 (1st Dept. 1993); *affd* 78 N.Y.2d 958 (1993). “Proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by such a delay.” *Williams v. Nassau County Med. Ctr.*, *supra* at 539; see also *Jordan v. City of New York*, *supra* at 659.

The Appellate Division, First Department has specifically addressed the issues of what constitutes “actual knowledge” of the essential facts, and also whether actual knowledge possessed by the police can be imputed to the City, and has rendered conflicting decisions. In *Evans v New York City Hous. Auth.*, 176 A.D.2d 221 (1st Dept. 1991), *lv denied* 79 N.Y.2d 754 (1992), the Supreme Court granted leave to serve a late notice of claim, holding that the existence of a police aided report indicated that the respondent had actual knowledge of essential facts underlying the crime of rape. The First Department reversed, noting that nothing in the aided report connected the rape with the defective lock or lack of security which was the basis of that petitioner’s notice of claim. In *Chattergoon v New York City Hous. Auth.*, *supra*, a majority of the First Department held that a police investigation of the homicide of petitioner’s decedent did not give actual knowledge to the respondent, since the police investigation was dedicated to locating the murderer and not toward defending any claim of negligence related to the respondent.

Matter of Schiffman v City of New York, 19 A.D.3d 206 (1st Dept. 2005), involved the actions of the police in response to an alleged assault and ensuing civilian struggle. In that case, the First Department held that the City acquired notice of the essential facts based on the fact that the police

called to the scene were directly involved in all aspects of the claims emanating from the death of that petitioner's decedent. The court further held that, since such knowledge was documented in the individual officers' memo books and official Police Department reports, it was imputed to the respondent municipality. Thus, held the First Department, the respondents in these matters were not prejudiced by any delay in the filing the notice of claim.

In *Matter of Ragland v New York City Hous. Auth.*, 201 A.D.2d 7 (2d Dept. 1994), the Appellate Division found that "actual knowledge has been found to exist when there are other factors in addition to the existence of an accident or aided report. A factor of considerable significance in this regard arises when it is the acts of the police which give rise to the very claim set forth in the proposed notice." *Id.*, at 9; *see also Tatum v. City of New York*, 161 A.D.2d 580 (2d Dept. 1990), *lv denied* 76 N.Y.2d 709 (1990) (false imprisonment and malicious prosecution); *McKenna v. City of New York, supra* (false arrest and imprisonment); *Montalto v. Town of Harrison*, 151 A.D.2d 652 (2d Dept. 1989) (false arrest and imprisonment and malicious prosecution); *Matter of Reisse v. County of Nassau*, 141 A.D.2d 649 (2d Dept. 1988) (false arrest and imprisonment, malicious prosecution, violation of civil rights); *Matter of Mazzilli v. City of New York*, 115 A.D.2d 604 (2d Dept. 1985) (assault). "Where, as here, members of the municipality's police department participate in the acts giving rise to the claim, and reports and complaints have been filed by the police, the municipality will be held to have actual notice of the essential facts of the claim. Since the reason for the early filing of a notice of claim is to permit the public corporation to conduct a prompt investigation into the facts and circumstances giving rise to the claim, the existence of reports in its own files concerning those facts and circumstances is the functional equivalent of an investigation." *Ragland*, 201 AD2d, *supra* at 11.

Since the City's police officers allegedly falsely arrested and imprisoned plaintiff, exercised

excessive force against her, and she was criminally prosecuted for the arrest, knowledge of her claim may be imputed to the City. See *Erichson v City of Poughkeepsie Police Dept.*, 66 AD3d 820 (2d Dept 2009) (police department acquired actual knowledge of assault claim since employees of police department engaged in conduct alleged); *Ansong v City of New York*, 308 AD2d 333 (1st Dept 2003) (knowledge imputed to city where officers who arrested plaintiff had knowledge of events in question); *Justiniano v New York City Hous. Auth. Police*, 191 AD2d 252 (1st Dept 1993) (knowledge of malicious prosecution claim imputed to city since city's officers initiated prosecution). Knowledge derived from police arrest records and District Attorney investigations resulting in an adjournment in contemplation of dismissal of a criminal action may be considered actual or constructive notice to the City. See *Tatum v City of New York*, 161 AD2d 580 (2d Dept 1990), *lv denied* 76 NY2d 709 (1990).

In light of the City's knowledge of plaintiff's claims, no prejudice would result if plaintiff were permitted to file a late notice of claim. See *Nunez v City of New York*, 307 AD2d 218 (1st Dept 2003). This Court notes that the City has not demonstrated how it has been, or would be, prejudiced by plaintiff's delay in filing her notice of claim. See *Grullon v City of New York*, 222 AD3d 257, 258 (1st Dept 1995). The City merely argues, as noted above, that its investigation would be hindered because plaintiff's criminal records "were most likely sealed". City's Aff. In Opp., at par. 18. First, this argument is speculative, since neither the City nor plaintiff has submitted information regarding whether plaintiff's criminal records were in fact sealed. Since such sealing could create prejudice to the City, the granting of a plaintiff's motion to file a late notice of claim under circumstances such as these must be "conditioned upon [her] execution of all requisite consents and authorizations to open [her] file in the criminal proceeding, thus affording [the City] a fair opportunity to investigate [her] claims." See *Rushmore v Hempstead Police Dept.*, 211 AD2d 776, 777 (2d Dept 1995);

Ragland, 201 AD2d, *supra* at 14.

Although plaintiff has failed to submit any legal support for her contention that her delay in filing her notice of claim was reasonable because there were criminal charges pending against her, it is well settled that plaintiff's failure to establish any of the factors set forth in GML § 50-e (5) is not necessarily determinative, and the absence of a reasonable excuse for the delay is not necessarily fatal to an application seeking leave to file a late notice of claim. *See Matter of Dell'Italia v. Long Is. R.R. Corp.*, *supra* at 759; *Matter of Chambers v. Nassau Co. Health Care Corp.*, 50 A.D.3d 1134 (2d Dept. 2008); *Nardi v. County of Nassau*, 18 A.D.3d 520 (2d Dept. 2005).

This Court notes that, although the petition herein was brought beyond the 90 day period set forth in GML 50-e(1)(a), it was still filed well within the one year and 90-day period during which courts are afforded broad discretion in deciding whether or not to grant the filing of a late notice of claim. *See* GML § 50-e (5). Given the above, the motion is granted.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for leave to serve a late notice of claim is granted on the conditions set forth below and the notice of claim annexed to plaintiff's motion is deemed timely served, *nunc pro tunc*, upon service of this order by plaintiff with notice of entry; and it is further,

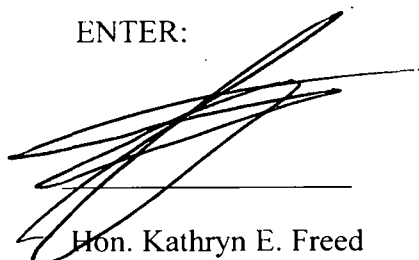
ORDERED that within 30 days of defendant The City of New York's service on plaintiff of the required authorizations, plaintiff is to deliver to defendant signed authorizations allowing defendant to examine, inspect, and copy the file and record in the criminal proceeding against plaintiff, and to unseal the police records in connection therewith; and it is further,

ORDERED that in the event plaintiff fails to comply with the foregoing conditions within the time frame set forth above, then the notice of claim is stricken, and the motion for leave to serve a late notice of claim is denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: September 29, 2014

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', written over a horizontal line.

Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**